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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92055426
Party	Defendant Leander Lodi
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of:

Run It Consulting, LLC,

Petitioner,

vs.

Leander Lodi, by Assignment from
Augusto Lodi dba American Muscle,

Registrant.

Cancellation No. 92055426

U.S. Trademark Registration No. 1,962,898

Mark: AMERICAN MUSCLE

Registered on Principal Register: 3/19/1996

Trademark Trial and Appeal Board
Commissioner for Trademarks
Via E-File

**REGISTRANT'S REPLY IN SUPPORT OF MOTION TO STRIKE
PETITIONER'S FIRST NOTICE OF RELIANCE - CONFIDENTIAL INFORMATION**

Following receipt and review of Petitioner's Opposition to the Motion to Strike, Registrant submits the following Reply.

1. THE MOTION TO STRIKE IS RIPE FOR ADJUDICATION.

A motion to strike a notice of reliance may be resolved before final hearing if a sufficient procedural basis for striking the notice of reliance can be found in the notice of reliance itself and the documents attached thereto. TBMP, §707.02(b)(2); Boyd's Collection Ltd. v. Herrington & Co., 65 USPQ2d 2017, 2019-20 (TTAB 2003) (whether produced documents constitute proper subject matter for a notice of reliance is not a substantive issue and may be determined from the face of the notice of reliance).

In its Opposition, Petitioner incorrectly submits that the Board would need to conduct an investigation of Registrant's discovery responses to properly decide the Motion to Strike. It is clear from the Rules and existing case law that a party submitting a notice of reliance must include within the notice of reliance everything supporting the basis for submitting the offered evidence by notice of reliance. M-Tek, Inc. v. CVP Systems, Inc., 17 USPQ2d 1070, 1073 (TTAB 1990). Registrant's Motion to Strike focuses only on the First Notice of Reliance - Confidential Information and establishes that Petitioner has failed to meet its burden.

Petitioner cannot reverse this burden onto Registrant by claiming that the Board must review Registrant's discovery responses in order to decide the Motion to Strike.¹ The burden rests squarely upon the party seeking to introduce evidence by notice of reliance. There is no need for the Board to look beyond the documents contained in Petitioner's Notice of Reliance to decide this Motion to Strike. If Petitioner is relying upon other documents and evidence to support its Notice of Reliance, they should have been included in the first instance. The Notice of Reliance must contain everything supporting the basis for admission of the purported evidence by notice of reliance.

Based upon the initial Motion and the foregoing, Registrant respectfully submits that the Motion to Strike is ripe for adjudication and that such should be decided prior to Registrant's testimony period.

2. PETITIONER'S OPPOSITION IMPROPERLY SHIFTS THE BURDEN TO REGISTRANT.

A party submitting evidence by notice of reliance bears the burden of proving that a proper basis for the introduction of the offered evidence by notice of reliance is permitted. TBMP §704.02. Existing rules and case law permit a party to rely upon discovery responses submitted by the other party in specific enumerated instances. The submission of responses to interrogatories and requests for admission are

¹Registrant is not opposed to the Board reviewing the entirety of his discovery responses as submitted with Petitioner's Opposition as such would not change Registrant's position. However, neither the Rules nor case law permit the review of such documents outside of the notice of reliance.

permissible through a notice of reliance. TBMP §704.10. In contrast, documents produced under Rule 34 are not ordinarily admissible by notice of reliance except in certain limited circumstances, i.e., printed publications and official records. TBMP §704.11. Another exception allows a party to submit documents that were provided as an answer to an interrogatory when such are properly authenticated. Id.

Petitioner's Opposition paints the instant Motion to Strike as an effort by Registrant to prevent the use of any of his discovery responses by Petitioner. Such is not the case. Registrant merely seeks to hold Petitioner to the burdens and standards established by the rules and case law of this tribunal that have been established to be more likely to result in a fair and just adjudication. Registrant's Motion to Strike establishes Petitioner's failure to provide a proper basis for submitting the produced documents by notice of reliance, in part, because the offered documents were not provided as all or part of Registrant's response to Petitioner's Interrogatory No. 23. While Petitioner paid lip service to Rule 2.120(j)(3)(i) in the First Notice of Reliance - Confidential Information, the facts do not support Petitioner's position.

Petitioner's Opposition begins with the faulty assumption that Registrant's response to Interrogatory No. 23 invoked the Option to Produce Business Records. Such assumption is not proper when Petitioner bears the burden of supporting its basis for introduction of evidence by notice of reliance. Petitioner's Opposition does not address this point beyond making the bare assumption. Petitioner is twisting the facts so as to fit the square peg of Registrant's response to Interrogatory No. 23 into the round hole of the Option to Produce Business Records under Rule 33(d). Registrant submits that because none of the conditions stated in Rule 33(d) were met by Registrant's response to Interrogatory No. 23, as established in the moving papers, Registrant cannot be found to have invoked the Option to Produce Business Records.

Petitioner's Opposition brief - page 4 - implies that Registrant intended to invoke the Option to Produce Business Records but simply failed to comply with the Rules. Such is not the case. This is a case of Petitioner twisting the facts so that it can meet its burden. In the absence of a finding that Registrant's response to Interrogatory No. 23 invoked the Option to Produce Business Records, Petitioner cannot meet its burden

to support the introduction of the documents produced under Rule 34 by notice of reliance.

Furthermore, none of the documents submitted by Petitioner in the First Notice of Reliance - Confidential Information were authenticated as true and correct copies of the documents that they purport to be, as by response to Request for Admission or otherwise. See Kohler Co. v. Baldwin Hardware Corp., 82 USPQ2d 1100, 1103-04 (TTAB 2007) (documents deemed properly submitted under notice of reliance where responding party availed itself of FRCP, Rule 33(d) **and** admitted that the documents produced in response to the discovery requests were true and correct copies of authentic documents in a response to requests for admission). Petitioner has not provided any basis in its First Notice of Reliance - Confidential Information that purports to authenticate these documents.

3. EQUITY, JUDICIAL EFFICIENCY AND LOGIC FAVOR REGISTRANT.

It is clear from the content of Registrant's response to Interrogatory No. 23 that Registrant produced documents in response to the first Request for Production of Documents and not as part of its interrogatory response or in lieu of responding to this interrogatory. Registrant's response to Interrogatory No. 23 clearly objected to the interrogatory on the basis of it being premature. Furthermore, Registrant specifically responded "that he cannot presently identify what documents, if any, that he expects to use, introduce or reply [sic] upon at the time of trial." It would be inconsistent to find that Registrant's response to Interrogatory No. 23 incorporated the entirety of his document production as a response to the interrogatory while at the same time stating that Registrant cannot presently identify the documents that he expects to use, introduce or rely upon at the time of trial.

Registrant does not contend that he did not provide full and complete answers to Petitioner's discovery requests. It is clear from Registrant's answer that Registrant deemed the discovery requests premature and not capable of being answered. Indeed, Registrant would not know what evidence, including documents he expected to use,

introduce or rely upon at trial until after Petitioner had submitted its evidence during its trial period.

Petitioner also argues judicial efficiency and equity in support of its position. This argument is based in part upon the timing of the instant Motion to Strike coming after the close of Petitioner's trial period. However, the Motion to Strike was filed a mere six (6) days after Petitioner's First Notice of Reliance - Confidential Information was submitted. Petitioner cannot cry foul and inequity when Petitioner itself waited until the end of its trial period to submit the subject Notice of Reliance. Registrant acted expeditiously and without undue delay to promptly move to strike Petitioner's Notice of Reliance. The timing is the result of Petitioner's own delay.

To address any concerns of fairness, the Board can allow Petitioner additional time to address any deficiencies in its Notice of Reliance. Such can come in the form of a period of days for Petitioner to submit a substitute Notice of Reliance that attempts to address the deficiencies.²

4. CONCLUSION.

Registrant respectfully submits that for the foregoing reasons, Petitioner's First Notice of Reliance - Confidential Information, specifically Exhibit B thereto, is not in compliance with existing procedural rules and case law and that such should be stricken.

Dated: April 5, 2013

Respectfully submitted,

KELLY & KELLEY, LLP

/Michael A. DiNardo/

MICHAEL A. DiNARDO
Attorneys for Registrant

²However, Registrant submits that the deficiencies inherent in Petitioner's First Notice of Reliance - Confidential Information, specifically Exhibit B thereto, are such that they cannot be remedied with any amount of additional time. Discovery is closed and Petitioner's trial period is closed. Petitioner's time to gather the necessary evidence and introduce the same has lapsed. There is nothing Petitioner can do at this time to remedy its failure to meet its burden.

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that the above **REGISTRANT'S REPLY IN SUPPORT OF MOTION TO STRIKE PETITIONER'S FIRST NOTICE OF RELIANCE - CONFIDENTIAL INFORMATION** is being electronically filed with the Trademark Trial and Appeal Board through the Electronic System for Trademark Trials and Appeals ("ESTTA") on April 5, 2013.

/Michael A. DiNardo/

Michael A. DiNardo
for KELLY & KELLEY, LLP

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the attached **REGISTRANT'S REPLY IN SUPPORT OF MOTION TO STRIKE PETITIONER'S FIRST NOTICE OF RELIANCE - CONFIDENTIAL INFORMATION** to be served on this date via U.S. first-class mail, postage prepaid, upon counsel for Petitioner, as follows:

Matthew H. Swyers, Esq.
344 Maple Avenue West, Suite 151
Vienna, VA 22180

/Nancy Hoover/

Dated: April 5, 2013

Nancy Hoover